Supreme Court, U.S.
FILED

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No. 06-1305 JAN 27 2007

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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVNIA,

Petitioner,

v.

LAWRENCE A. GAUL, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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Dated: March 26, 2007

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QUESTION PRESENTED

Did the Supreme Court of Pennsylvania err in finding that Gaul was subject to custodial interrogation without properly considering the precedent established by this Honorable Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980)?

Answered in the negative by the court below.

Suggested Answer: Yes

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The December 27, 2006 Opinion of the Supreme Court of Pennsylvania, *Commonwealth v. Gaul*, 912 A.2d 252 (Pa. 2006), is reproduced in the Appendix.

JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This petition is filed to request the issuance of a writ of *certiorari* from the decision of the Supreme Court of Pennsylvania entered December 27, 2000, which affirmed the suppression of statements made by Lawrence A. Gaul, Jr., Respondent, while in custody before warnings were given pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966). (App. 3, 8). Gaul filed a successful suppression motion at the trial court level, but this decision was reversed by the

Superior Court of Pennsylvania. (App. 3). Gaul was successful in petitioning the Supreme Court of Pennsylvania for discretionary review and obtaining the reinstatement of the decision of the suppression court. (App. 3, 8). It is this decision from which the Commonwealth files the instant petition.

Procedural History

On August 21, 2003, a Criminal Complaint was filed against Lawrence Adam Gaul, Jr., Respondent, charging him with Theft By Unlawful Taking or Disposition, 18 Pa.C.S.A. §3921(a), Receiving Stolen Property, 18 Pa.C.S.A. §3925(a), Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms, 18 Pa.C.S.A. §6105(a)(1) and Firearms Not to Be Carried Without a License, 18 Pa.C.S.A. §6106(a)(1). Gaul waived his preliminary hearing on August 29, 2003, and he was formally arraigned on the charges on September 22, 2003.

On December 2, 2003, Gaul filed an Omnibus Motion for Pretrial Relief, which included a Motion to Suppress a statement Gaul made to Criminal Investigator Harold Shenk shortly after he was arrested. A hearing was held on this motion on February 4, 2004, and the statement was suppressed on February 25, 2004. The Commonwealth's timely appeal resulted in the reversal of the decision of the suppression court and remand of this case for trial on January 19, 2005. The Supreme Court of Pennsylvania granted allocatur on August 2, 2005. On December 27, 2006, the Court entered an Opinion reversing the decision of the Superior Court of Pennsylvania and reinstating the suppression decision.

The Commonwealth now files this petition for writ of *certiorari* requesting this Honorable Court to review the sole question of whether Gaul was subject to interrogation as defined in *Rhode Island v. Innis*, 446 U.S. 291 (1980) while he was in custody before *Miranda* warnings were given.

Factual History

On July 4, 2003, Gaul was visiting his friend, Sherri Burns, at her home. (App. 2). At some point, Ms. Burns left Gaul alone in her living room. (App. 2). The next day, Ms. Burns discovered that her handgun was missing from the end table in her living room. (App. 2). Ms. Burns reported the gun stolen, and Gaul was eventually arrested. (App. 2).

When Gaul was brought to the detention area for the Reading Police Department, Criminal Investigator Harold Shenk read the Criminal Complaint and attached Affidavit of Probable Cause to Gaul in its entirety. (App. 2). Criminal Investigator Shenk explained that because Gaul was in custody, he would have to read him his Miranda rights. (App. 2). Criminal Investigator Shenk asked Gaul if he would like to discuss the charges, and again explained that he would have to read him his Miranda rights, as he was in custody. (App. 2). In response, Gaul stated, "Off the record, I can get you the gun back, but you have to make a deal with me." (App. 2). Criminal Investigator Shenk informed Gaul that he did not have the authority to make deals or offer guarantees, and he terminated the encounter. (App. 2).

REASONS FOR GRANTING THE WRIT

The Commonwealth of Pennsylvania seeks discretionary review of the Opinion of the Supreme Court of Pennsylvania on the grounds that the Supreme Court incorrectly decided the *Miranda* issue by defining the existence of an "interrogation" in the instant case based upon the perceptions of the police officer, contrary to this Honorable Court's decision in *Rhode Island v. Innis*, 446 U.S. 291 (1980). In *Innis*, this Honorable Court defined the term "interrogation" based upon the perceptions of the suspect, not the intent of the police. Because the analysis conducted by the Supreme Court of Pennsylvania focused on the perceptions of the wrong party, the Commonwealth's petition for writ of *certiorari* should be granted.

1. THE SUPREME COURT OF PENNSYLVANIA FAILED TO DETERMINE THE EXISTENCE OR ABSENCE OF AN INTERROGATION IN ACCORDANCE WITH THE PRECEDENT ESTABLISHED BY THIS HONORABLE COURT.

Miranda v. Arizona, 384 U.S. 436 (1966) stands for the principle that when a person is questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way," law enforcement must inform the person of his rights to remain silent and to counsel. *See In the Interest of V.H.*, 788 A.2d 976, 979-980 (Pa. Super. 2002) (*citing Stansbury v. California*, 511 U.S. 318 (1994)). The term "interrogation" was further defined by this Honorable Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980).

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other

> than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

See Innis, 446 U.S. at 301-302 (emphasis in original) (footnotes omitted). This Honorable Court noted that the *Miranda* decision applied to all custodial questioning where the individual was subjugated to the will of the examiner, including the employment of investigative techniques which did not involve the express questioning of the subject in custody. *See Innis*, 446 U.S. at 299 (*citing Miranda*, 384 U.S. at 453, 457-458, 450). Notably, a police officer's belief that a suspect possibly may incriminate himself does not make an otherwise benign encounter interrogational. *See Arizona v. Mauro*, 481 U.S. 520, 528 (1987). Thus the police officer's observations are largely irrelevant to the analysis.

As recognized in *Miranda* and *Innis*, there are many circumstances in which *Miranda* does not apply. *Miranda* is clear that volunteered statements are always freely admissible, regardless of the administration of *Miranda* warnings. *See Innis*, 446 U.S. at 300 (*citing Miranda*, 384 U.S. at 478). "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question." *Oregon v. Elstad*, 470 U.S. 298, 312 (1985). Accordingly, volunteered statements, even while in custody, are not effected by the *Miranda* decision. *See Innis*, 446 U.S. at 300 (*citing Miranda*, 384 U.S. at 478). Additionally, "routine booking questions" designed to elicit biographical information from a suspect to complete the booking process are exceptions to the *Miranda* exclusionary rule, as they are reasonably related to the administrative concerns of the police. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601-602 (1990). Questioning a suspect before the administration of *Miranda* warnings regarding the location of a weapon for public safety purposes is also recognized as an exception to the *Miranda* rule. *See New York v. Quarles*, 467 U.S. 649, 655-656 (1984). Thus *Miranda* does not create a *per se* rule – its applicability is based on the facts and circumstances of each case. *See Miranda*, 384 U.S. at 491.

This precedent reveals the error committed by the Supreme Court of Pennsylvania in the instant case. As recognized by the dissent authored by Justice Castille, the majority improperly focused on the perceptions of Criminal Investigator Shenk when analyzing whether Gaul was subject to interrogation. (App. 11-12). The majority found

that Criminal Investigator Shenk knew that he was interrogating Gaul because he advised Gaul twice that he would have to read him his *Miranda* warnings. (App. 6). However, as recognized by the dissent authored by Justice Castille, these were not facts found by the lower courts, and this analysis does not properly consider the facts from the perspective of Gaul. (App. 11-12). The intent of the police officer is irrelevant to the analysis of whether an interrogation exists. *See Innis*, 446 U.S. at 301-302. Thus the analysis employed by the majority of the Supreme Court of Pennsylvania was improper.

When reviewing the situation from the perspective of Gaul, it is apparent from his response that he was not subject to interrogation. The majority found that because Criminal Investigator Shenk read the Criminal Complaint and Affidavit of Probable Cause in its entirety, these actions were likely to invoke an incriminating response because Gaul would naturally want to defend himself from the accusations made against him by providing his own version of the crime. (App. 7). However, the facts reveal that Gaul made no attempts to defend himself by providing his own version of the events of the crime, but attempted to negotiate a deal with Criminal Investigator Shenk. (App. 2). Clearly Gaul was attempting to negotiate the withdrawal of the criminal charges in exchange for the return of the gun. If Gaul believed that he was subject to custodial interrogation, which are usually recorded for admission at later court proceedings, he would not have offered to make a deal. Thus the analysis employed by the majority was not supported by the record. Because this attempt to negotiate a deal was not a natural, foreseeable response to an accusation that he committed a crime, the

facts do not reveal that Gaul perceived that he was subject to interrogation within the definition of *Innis*.

In this respect, the case at bar is similar to *United States v. Castro*, 723 F.3d 1527 (11th Cir. 1984). In *Castro*, police confronted the defendant at gunpoint and demanded, "What in the world is going on here?" *Id.*, 723 F.3d at 1529. In response, the defendant replied, "You want money? We got money." *Id.* Although police had not given *Miranda* warnings, the statement was found to be admissible, as it was not responsive to the question posed by the police, and was in fact an offer to commit a crime – the bribery of the officer. *Id.*, 723 F.3d at 1530. "The safeguards of *Miranda* can not be extended that far. An attempt to commit another crime designed to interfere with a police officer's carrying out of his duties simply must be beyond the intent of *Miranda*." *Id.*, 723 F.3d 1530-1531.

Likewise, the statement made by Gaul was not responsive to the question posed by Criminal Investigator Shenk. Criminal Investigator Shenk was attempting to discern whether Gaul was willing to discuss the crime when Gaul volunteered his statement. (App. 2). Additionally, the response made by Gaul was not directly related to the information contained in the charging documents. Instead, he attempted to interfere with Criminal Investigator's duties by offering to return the weapon in exchange for favorable treatment. (App. 2). Thus, like *Castro*, it would be a perversion of the *Miranda* prophylactic rules to permit the use of *Miranda* to shield Gaul's attempt to subvert his prosecution for the crime.

Additionally, as recognized by the dissent authored by Justice Eakin, Criminal Investigator Shenk was simply

performing his duties as required by law when he read the charging documents to Gaul. (App. 15). As stated above, *Innis* was clear that the prophylactic measures required by *Miranda* only apply to "any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *See Innis*, 446 U.S. at 301-302 (emphasis added). The law requires that once a suspect is arrested pursuant to a warrant, he shall be arraigned without unnecessary delay, at which time he shall receive a copy of the Criminal Complaint and attached affidavits. Pa. R. Crim. P. 516(A) and 540(C). By reading the complaint and affidavits to Gaul, Criminal Investigator Shenk was doing nothing more than that which is required by the law. Thus Criminal Investigator Shenk was participating in actions normally attendant to arrest and custody, which are specifically excepted from the requirements of *Miranda* in *Innis*. *See Innis*, 446 U.S. at 301-302. As a result, Criminal Investigator Shenk's actions reveal no psychological or coercive police practices, which were the basis for the *Miranda* decision. *See Innis*, 446 U.S. at 299 (*citing Miranda*, 384 U.S. at 453, 457-458, 450).

In this respect, the current situation is similar to that in *United States v. Lockett*, 393 F.3d 834 (8th Cir. 2005). In *Lockett*, the defendant was arrested and transported to the police station. *Id.*, 393 F.3d at 836. The defendant inquired into the basis for his arrest, and the officer informed him that a charge of terroristic threats was filed against him. *Id.*, 393 F.3d at 836-837. The defendant then made an incriminating statement. *Id.*, 393 F.3d at 837. The Eighth Circuit held that because the information supplied by the police officer was attendant to arrest and custody, and in

response to the defendant's inquiries, the statement was voluntary and not prohibited by *Miranda*. *Id.*, 393 F.3d at 838.

Likewise, the instant case involves the relation of information to Gaul attendant to his arrest and custody. It is after Gaul was informed of the basis of the charges leveled against him that he made the incriminating statement. (App. 2). Because the law requires this information to be relayed, the actions of Criminal Investigator Shenk were attendant to arrest and custody, rendering Gaul's statement voluntary and freely admissible.

Additionally, the result of the Opinion of the majority of the Supreme Court of Pennsylvania fails to consider all of the circumstances surrounding the interaction between Criminal Investigator Shenk and Gaul, which is required by *Miranda*. *See Miranda*, 384 U.S. at 491. If reading the charging documents is determined to constitute "interrogation," then simply giving the documents to the defendant has the same effect – he can still make statements regarding his culpability upon reading the accusations against him without any police involvement whatsoever. Thus the instant case would be no different than any other case where a defendant is arrested based upon an outstanding arrest warrant. As recognized by the dissent authored by Justice Eakin, this creates a *per se* rule without considering the circumstances of each case – a result contrary to that contemplated by *Miranda*. *See Miranda*, 384 U.S. at 491; (App. 15-16).

As these analyses reveal, the actions taken by Criminal Investigator Shenk to read the charging documents to Gaul after his arrest do not constitute an interrogation within the meaning of *Innis*. Because the Opinion in the

instant case, *Commonwealth v. Gaul*, 912 A.2d 252 (Pa. 2006), reached a contrary conclusion, the Supreme Court of Pennsylvania has issued a decision which decided an important federal question in a way that conflicts with decisions of this Honorable Court. Accordingly, the instant petition for a writ of *certiorari* should be granted.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Honorable Court to grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: March 26, 2007

912 A.2d 252

[J-164-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LAWRENCE A. GAUL, JR., Appellant	: No. 86 MAP 2005 : Appeal from the Order of the Superior Court entered January 19, 2005 at No. 473 MDA 2004, that vacated and remanded the Order of Court of Common Pleas of Berks County, Criminal Division, entered February 25, 2004 at No. 4696/03. : 867 A.2d 557 (Pa. Super. Ct. 2005) : RESUBMITTED: August 22, 2006

OPINION

MR. CHIEF JUSTICE CAPPY* **DECIDED: December 27, 2006**

In this appeal, we are asked to consider whether Appellant Lawrence A. Gaul, Jr., was subject to a custodial interrogation during a police encounter, and, thus, was entitled to *Miranda*[1] warnings. The Superior Court

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* This matter was reassigned to this author.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

concluded that he was not subject to a custodial interrogation and reversed the trial court's order suppressing Appellant's statement. Because we find that the encounter amounted to a custodial interrogation, we reverse the order of the Superior Court and reinstate the order of the trial court suppressing Appellant's statement.

The facts surrounding the meeting between Appellant and the police establish that on July 4, 2003, Appellant was at the residence of his friend, Sherri Burns. At some point during the visit, Burns left Appellant alone in her living room. The next day, Burns discovered her handgun was missing from an end table in the living room and reported it stolen. The police investigated and Appellant was arrested in connection with the stolen handgun.

Appellant was taken to a detention center in Reading, Pennsylvania, where Investigator Harold T. Shenk read Appellant the criminal complaint and the affidavit of probable cause. Investigator Shenk explained to Appellant that since he was in custody, he would have to be informed of his *Miranda* rights. Investigator Shenk then asked Appellant if he wanted to discuss the pending charges, and again stated he would have to give Appellant *Miranda* warnings since he was under arrest. In reply, Appellant stated, "Off the record, I can get you the gun back, but you have got to make a deal with me." N.T., Pre-trial hearing, 2/4/2004, at 41. Investigator Shenk told Appellant he could not make any deals or offer any guarantees, and terminated the conversation.

Appellant filed a motion to suppress his statement to Investigator Shenk on the basis that he was subject to a custodial interrogation and that Investigator Shenk failed to give him *Miranda* warnings. Following a hearing, the

trial court agreed with Appellant and granted his motion. In its Pa.R.A.P. 1925 statement, the trial court explained that Appellant was in custody at the time Investigator Shenk spoke with him. The court also cited *Commonwealth v. DeJesus,* 787 A.2d 394 (Pa. 2001), and concluded that the encounter amounted to an interrogation when Appellant was informed of the implicative statements made by Burns. At this point, "Shenk should have known that his comments were reasonably likely to elicit an effort by [Appellant] to defend himself, offer alternative explanations, or provide a responsive statement." Trial Court opinion, 4/30/2004, at 4.

On appeal, the Superior Court reversed the trial court's decision on the basis that Investigator Shenk's "question was not the type designed to or likely to evoked [sic] an incriminating response." *Commonwealth v. Gaul,* 867 A.2d 557, 559 (Pa. Super. Ct. 2005). Furthermore, Appellant's reply was a "voluntary and unresponsive utterance" made after Investigator Shenk attempted to ascertain whether Appellant understood his situation. *Id.*

This court granted allowance of appeal to consider whether the encounter between Investigator Shenk and Appellant amounted to a custodial interrogation and whether the Superior Court's opinion conflicted with this court's decision in *DeJesus.*

Our standard of review of suppression rulings is well settled. We are bound by the factual findings of the suppression court that are supported by the record, but we are not bound by the court's conclusions of law. *Commonwealth v. Templin,* 795 A.2d 959, 961 (Pa. 2002). "The determination of whether a confession is voluntary is a conclusion of law, and as such, is subject to plenary

review." *Commonwealth v. Templin,* 795 A.2d 959, 961 (Pa. 2002). Moreover, when the Commonwealth appeals from a suppression order, we consider only the evidence of the defense together with the evidence of the Commonwealth that remains uncontradicted when read in the context of the entire record. *Commonwealth v. Nester,* 709 A.2d 879, 880-81 (Pa. 1998).

The principles surrounding *Miranda* warnings are also well settled. The prosecution may not use statements stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel. *DeJesus,* 787 A.2d at 401. Thus, *Miranda* warnings are necessary any time a defendant is subject to a custodial interrogation. As the United States Supreme Court explained, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis,* 446 U.S. 291 (1980). Moreover, in evaluating whether *Miranda* warnings were necessary, a court must consider the totality of the circumstances. *See Commonwealth v. Williams,* 640 A.2d 1251, 1259 (Pa. 1994).

In conducting the inquiry, we must also keep in mind that not every statement made by an individual during a police encounter amounts to an interrogation. Volunteered or spontaneous utterances by an individual are admissible even without *Miranda* warnings. *See, e.g., Commonwealth v. Baez,* 720 A.2d 711, 720 (Pa. 1998). Similarly, *Innis* does not "place the police under a blanket prohibition from informing a suspect about the nature of the crime under investigation or about the evidence relating to the charges against him." *DeJesus,* 787 A.2d at 402.

With these general principles in mind, we now turn to the specific issue raised in this case. There is no question that Appellant was in custody at the time of the interview with Investigator Shenk. Thus, the only question before us is whether the encounter rose to the level of an interrogation or the "functional equivalent" of an interrogation, such that the *Miranda* safeguards were implicated.

In *DeJesus,* we defined interrogation as "questioning initiated by law enforcement officials." *DeJesus,* 787 A.2d at 401 (*quoting Miranda*). We also explained that the "functional equivalent" of interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 402 (*quoting Innis*).

We then had the opportunity to expand on what conduct amounts to the "functional equivalent" of interrogation. In performing this inquiry, we explained that under *Innis,* the court must focus on a suspect's perceptions and give relevance to the officer's constructive knowledge. *Id.* at 402. Such considerations were required by the *Innis* Court's direction that the inquiry must look at the suspect's perceptions rather than the intent of the police. *Id.* Moreover, "a practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to an interrogation." *Id.* (*quoting Innis,* 446 U.S. at 301).

Using this framework, we then considered the totality of circumstances presented in *DeJesus,* which included the police repeatedly informing DeJesus of the charges against him. The police also told DeJesus what others implicated in the crime had said about him in their statements to the

police. Indeed, after over three hours, the police showed the defendant the statements that the others had made. It was at this point of the encounter that DeJesus made an incriminating statement without *Miranda* warnings.

In evaluating these circumstances, we explained that merely because the police officer's statements were intended to be informational, did not mean that they could not also have been "reasonably likely to elicit an incriminating response" from the defendant. *Id.* at 403. Rather, we concluded that focusing on DeJesus' perceptions, when the police "explained to Appellant that he had been implicated in the shootings, telling him what the statements [the co-conspirators] had made to the police concerning his involvement, the detective should have known that his comments and conduct were reasonably likely to evoke an effort on Appellant's part to defend himself and give his own version of his involvement in the crimes at issue." *Id.*

We conclude the instant case is controlled by *DeJesus.* In this case, when Investigator Shenk explained to Appellant that he was accused of the theft and read Burns' statement implicating him, Investigator Shenk should have known that his comments were reasonably likely to evoke an incriminating response from Appellant. Investigator Shenk told Appellant that he would have to give him *Miranda* warnings on two separate occasions. The second time, Investigator Shenk acknowledged Appellant was in custody, but then asked Appellant if he wanted to discuss the pending charges and informed him that if he did, he would have to give him *Miranda* warnings. Clearly, Investigator Shenk was aware that he needed to give Appellant *Miranda* warnings before Appellant said anything, indicating his belief that Appellant was subject to an interrogation. Furthermore, when he presented

Appellant with the incriminating statements made by Burns in addition to the charges against him, Investigator Shenk should have known that Appellant would want to defend himself and give his own version of his involvement in the crimes at issue. *DeJesus supra.* Accordingly, not only should Investigator Shenk have known that his comments were reasonably likely to evoke an incriminating response from Appellant, but we conclude that the totality of the circumstances indicate that Investigator Shenk almost certainly knew that his conduct was likely to evoke a response from Appellant based upon his repeated acknowledgments that he would have to give Appellant *Miranda* warnings.

While this case is distinct from *DeJesus* in certain respects, since the encounter was much shorter in length and Appellant was not repeatedly told of the charges against him, we find these to be distinctions without a difference. Such considerations are relevant in determining whether the statement was involuntary or the waiver of *Miranda* rights was knowing. *See DeJesus,* 787 A.2d at 403 (explaining that the waiver of *Miranda* rights must be "the product of free and deliberate choice rather than intimidation, coercion, or deception"); *see also Commonwealth v. Watkins,* 843 A.2d 1203, 1213 (Pa. 2003). They have limited relevance, however, to our determination of whether a police officer engaged in a practice he should have known is reasonably likely to evoke an incriminating response.

Rather, as we explained in *DeJesus,* the linchpin of the *Miranda* analysis is the perception of the suspect and the constructive knowledge of the police. Merely because a police officer intended the encounter to be informational

does not mean that it could not also constitute an interrogation. *DeJesus,* 787 A.2d at 403. Viewed in this light, there can be no doubt that Appellant was subject to the functional equivalent of an interrogation. *DeJesus supra.* Accordingly, Appellant was entitled to *Miranda* warnings at the outset of this process.

For the reasons stated herein, the order of the Superior Court is reversed and the order of the trial court suppressing the statements is reinstated.

Messrs. Justice Saylor and Baer and Madame Justice Baldwin join the opinion.

Mr. Justice Castille files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion in which Madame Justice Newman joins.

JUDGMENT ENTERED:
December 27, 2006

/s/ Norina K. Blynn
Norina K. Blynn, Chief Clerk

[J-164-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LAWRENCE A. GAUL, JR., Appellant	: No. 86 MAP 2005 : Appeal from the Order of the Superior Court entered January 19, 2005 at No. 473 MDA 2004, that vacated and remanded the Order of Court of Common Pleas of Berks County, Criminal Division, entered February 25, 2004 at No. 4696/03. : 867 A.2d 557 (Pa. Super. 2005) : RESUBMITTED: August 22, 2006

DISSENTING OPINION

MR. JUSTICE CASTILLE

I join Mr. Justice Eakin's Dissenting Opinion, but I write separately to address two overly broad assertions and determinations posited by the Majority Opinion in its discussion of whether Investigator Shenk "should have known" that his statements were reasonably likely to elicit an incriminating response from appellant. I believe that these broad assertions and determinations amount to classic "Monday morning quarterbacking."

In *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682 (1980), the United States Supreme Court addressed the issue of the meaning of "interrogation" under the system of prophylactic rules promulgated in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966). The High Court concluded the following:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Innis, 446 U.S. at 300-02, 100 S.Ct. at 1689-90 (emphasis in original) (footnotes omitted). Accordingly, the High

Court announced a supposed objective test, rather than a subjective test, for the "functional equivalent" of express questioning – *i.e.*, whether the police *should have known* that their conduct was reasonably likely to elicit an incriminating response. As noted by the *Innis* Court, this objective test focuses principally on the suspect's perceptions and not on the intent of the police. *Id.* at 301, 100 S.Ct. at 1690. Indeed, decisions from this Court since *Innis* have recognized and applied this objective test. *See, e.g., Commonwealth v. DeJesus,* 787 A.2d 394, 402-03 (Pa. 2001); *Commonwealth v. Hughes,* 639 A.2d 763, 771 (Pa. 1994).

In reaching the ultimate conclusion that Investigator Shenk breached appellant's constitutional rights by not providing him *Miranda* warnings prior to the imputed interrogation that produced the incriminating statement, the Majority relies on unsupported and irrelevant speculations. First, the Majority asserts that, because Investigator Shenk informed appellant on two occasions that he would have to give him *Miranda* warnings because he was in custody, this is clear evidence that Investigator Shenk believed that he was interrogating appellant. Maj. slip op. at 5-6 ("Clearly, Investigator Shenk was aware that he needed to give Appellant *Miranda* warnings before Appellant said anything, indicating his belief that Appellant was subject to an interrogation."). The Majority's subjective determination that Investigator Shenk "clearly" believed that he was conducting an interrogation of appellant is not supported by any fact-finding below and, in any event, any would-be appellate "fact-finding" along these lines is irrelevant under *Innis/DeJesus*. Similarly, the Majority asserts that "the totality of the circumstances indicates

that Investigator Shenk *almost certainly knew* that his conduct was likely to evoke a response from Appellant based upon his repeated acknowledgements that he would have to give Appellant *Miranda* warnings." *Id.* at 6 (emphasis added). Again, this is both pure speculation and irrelevant under *Innis/DeJesus*. We have no idea of just what the Investigator knew as there is no evidence of record pertinent thereto. What is at issue is what the *Innis* fiction requires us to attribute to the officer. And, on that question, I join Justice Eakin's dissent. As noted above, the definition of "the functional equivalent of express questioning" as announced by the *Innis* Court is whether the police should have known that their conduct was reasonably likely to elicit an incriminating response; "almost certainly knew" is not the proper standard.

[J-164-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LAWRENCE A. GAUL, JR., Appellant	: No. 86 MAP 2005 : Appeal from the Order of the Superior Court entered January 19, 2005 at No. 473 MDA 2004, that vacated and remanded the Order of Court of Common Pleas of Berks County, Criminal Division, entered February 25, 2004 at No. 4696/03. : 867 A.2d 557 (Pa. Super. Ct. 2005) : RESUBMITTED: August 22, 2006

DISSENTING OPINION

MR. JUSTICE EAKIN DECIDED: December 27, 2006

Because I believe appellant was not subject to interrogation for *Miranda*[1] purposes, I respectfully dissent.

The majority finds *Commonwealth v. DeJesus,* 787 A.2d 394 (Pa. 2001), controlling here. *See* Majority Slip Op., at 5. In that case, the police arrested DeJesus and took him to a police administration building where he was

[1] *Miranda v. Arizona,* 384 U.S. 436 (1966).

placed in an interview room. There, over about a three-hour period, a detective informed him of the charges against him and told him that others also charged with the crimes made statements incriminating him. *DeJesus,* at 400-01. DeJesus then made an incriminating statement without *Miranda* warnings. *Id.,* at 401. This Court determined that when the detective informed DeJesus he had been implicated in the shootings and told him of the content of the co-conspirators' statements concerning his involvement, the detective should have known his comments were reasonably likely to evoke a defensive response from DeJesus in which he would have provided his own version of his involvement in the case. *See id.,* at 403. Thus, providing DeJesus with the implicative statements of the co-conspirators was found to rise to the level of an interrogation, and the detective should have provided *Miranda* warnings. *Id.,* at 404.

The majority herein applies *DeJesus* and concludes that, in reading the criminal complaint and the affidavit of probable cause, which included the incriminating statement from Burns, Investigator Shenk knew he would likely elicit an incriminating response. Majority Slip Op., at 6. The facts of the instant case share similarities with *DeJesus.* Here, Investigator Shenk did not provide appellant with *Miranda* warnings, and after informing appellant of the charges against him, he proceeded to read the affidavit of probable cause, which contained the incriminating statement by Burns.

However, the present case contains critical distinctions from *DeJesus.* The police interaction with appellant was not a three-hour "interview," as in *DeJesus*; Investigator Shenk read appellant the criminal complaint and the affidavit of probable cause, and did so only once. Further,

after Investigator Shenk read the complaint and affidavit, he explained that, since appellant was in custody, he would have to read appellant his *Miranda* rights. Investigator Shenk then merely asked appellant if he wanted to discuss the charges, and again stated he would give appellant *Miranda* warnings before discussing it further. At that point, appellant made an incriminating statement.

While the affidavit of probable cause informed appellant that Burns gave the police a statement incriminating him, Burns was the victim, not a co-conspirator. Learning the obvious fact that you are under arrest because the victim accuses you is qualitatively different than learning your co-conspirators are shifting blame to you. Unlike *DeJesus,* appellant did not make his incriminating statement in immediate response to learning Burns incriminated him; appellant made the response after Investigator Shenk informed him he was in custody and asked if he wanted to discuss the charges; if so, he would have to receive his *Miranda* warnings. This is not conduct that this Court should condemn as unconstitutional. Reading the charging documents, copies of which must be given to the accused anyhow, does not comprise interrogation. Telling the accused that if he wishes to discuss matters, warnings must be given, is not interrogation.

The record does not support a finding that Investigator Shenk knew his statements were reasonably likely to elicit an incriminating response from appellant. There can be no *per se* rule that informing an accused of the contents of the affidavit, or the existence of witnesses incriminating him, will comprise "interrogation" in every case; this determination is contextual. In this case, there is no reason for this Court to find a constructive interrogation in the neutral, even helpful, behavior of this officer. Thus,

I would hold interrogation did not occur, and the absence of *Miranda* warnings does not render appellant's statement inadmissible. *See Commonwealth v. Fisher,* 769 A.2d 1116, 1125 (Pa. 2001) (unsolicited, spontaneous, or voluntary remark is not result of custodial interrogation and is not subject to suppression).

Madame Justice Newman joins this dissenting opinion.